Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

ALAN ROSS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to instruct the jury that, in order to convict the defendant of an offense under 21 U.S.C. §848, it must reach a unanimous, beyond a reasonable doubt, verdict as to each of the three violations which it finds to comprise the continuing series of violations with respect to which the defendant occupied an organizer, supervisor or management position and from which he derived substantial income or resources, as required by *Richardson v. United States*, 526 U.S. 813 (1999), so substantially undermines the jury trial right guaranteed to federal criminal defendants by the Sixth Amendment to the United States Constitution that it should be regarded as structural error not subject to review for harmless error.

2. If such error is subject to harmless error review, whether, where the constitutional error has not previously been reviewed under the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), a federal court on collateral review of a federal conviction under 28 U.S.C. §2255 should apply the *Chapman* standard or instead the substantial and injurious influence standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

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The opinion of the Eleventh Circuit Court of Appeals is reported at 289 F.3d 677 (11th Cir. 2002).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on April 19, 2002. Ross' timely petition for rehearing and petition for rehearing *en banc* was denied on August 9, 2002. This Court has jurisdiction to review the judgment of the Eleventh Circuit on a writ of certiorari under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. §848 provides, in pertinent part:

> **Penalties; forfeitures**
> (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the

greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title . . . .

* * * *

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

Ross was charged in a three count indictment with engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848 ("CCE"), as well as conspiracy to possess cocaine and marijuana and conspiracy to import cocaine and marijuana. The §848 count set forth only the bare-bones language of the statute and did not specify the three or more violations which were alleged to constitute the requisite continuing series of violations. At trial, the district court refused Ross' request that the jury be instructed that it was required to agree unanimously upon the three or more violations it found to constitute the §848 continuing series of violations. Instead, the jury was instructed:

A "continuing series of violations" means proof of at least three violations of the federal controlled substances law, and also requires a finding that those violations were connected together as a series of related or ongoing activities, as distinguished from isolated or disconnected acts. It is not necessary that an offense be charged in order for it to constitute part of a continuing series of violations.

The jury returned verdicts of guilty on all counts, and Ross was sentenced to three concurrent terms of life imprisonment, which he is currently serving. On appeal, the Eleventh Circuit Court of Appeals rejected Ross' argument that the district court erred in refusing to give a specific unanimity instruction regarding the §848 series violations. *United States v. Ross*, 33 F.3d 1507, 1525 n.32 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995).

On June 1, 1999, this Court decided *Richardson v. United States*, 526 U.S. 813 (1999), in which it held that the individual violations which were alleged to comprise the §848 continuing series of violations were elements of the §848 offense, each of which the jury was required to find unanimously and beyond a reasonable doubt. Ross moved to amend his then-pending 28 U.S.C. §2255 motion to add a claim based on *Richardson*. After receiving submissions from both parties, the Magistrate Judge recommended that leave to amend be granted and that additional briefing directed to the issue whether the *Richardson* issue was harmless be ordered. Although it was quite plain that the Magistrate Judge considered the appropriate frame of reference for the harmlessness inquiry to be the harmless beyond a reasonable doubt standard of *Neder v. United States*, 527 U.S. 1 (1999), and *Chapman v. California*, 386 U.S. 18 (1967), the government filed no objections to the Report and Recommendation. In supplemental briefing filed after the district court adopted the Magistrate Judge's recommendation, the government expressly argued that the *Neder/Chapman* standard

should be applied. In his second Report and Recommendation, the Magistrate Judge again addressed the issue under the *Neder/Chapman* harmless beyond a reasonable doubt standard, and the government again did not object to the Magistrate Judge's formulation of the harmless error inquiry. The district court ruled, consistently with every circuit which has considered the issue, that *Richardson* was retroactive to cases on collateral review[1] and that the failure in this case to instruct the jury that it was required to agree unanimously and beyond a reasonable doubt regarding the three or more violations which it found to constitute the continuing series of violations was constitutional error under *Richardson*. The district court concurred that *Neder/Chapman* provided the correct analytical framework and that the burden was on the government to demonstrate harmlessness beyond a reasonable doubt, but ultimately concluded that the error was harmless.

On appeal, the Eleventh Circuit agreed that *Richardson* was retroactive to cases on collateral review,[2] such as this one, and that constitutional error had occurred here. The Court concluded that the error was not a structural one, but instead was subject to harmless error review. As to the harmless error standard to be applied, the government suggested for the first time on appeal that "there is an argument to be made" that the district court should have applied the "substantial and injurious effect or influence" standard of *Brecht v. Abrahamson*, 507 U.S.

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1 *See Santana-Madera v. United States*, 260 F.3d 133 (2d Cir. 2001), *cert. denied*, 122 S.Ct. 817 (2002); *United States v. Lopez*, 248 F.3d 427, 432 (5th Cir.), *cert. denied*, 122 S.Ct. 222 (2001); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir.), *cert. denied*, 531 U.S. 930 (2000); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

2 The government filed a petition for rehearing directed to the retroactivity issue, which was denied by the Court. See App. 13.

619 (1993), rather than the *Neder/Chapman* harmless beyond a reasonable doubt standard. The Eleventh Circuit, despite the government's waiver of the issue, proceeded to address the issue of whether *Brecht* or *Chapman* provided the appropriate harmless error standard and concluded that, because this case was a collateral attack on Ross' conviction, the *Brecht* standard should be applied, notwithstanding the fact that Ross' *Richardson* claim had not been afforded *Chapman* review on direct appeal. *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FAILURE TO INSTRUCT THE JURY THAT IT MAY NOT CONVICT A CRIMINAL DEFENDANT OF VIOLATING 21 U.S.C. §848 UNLESS IT REACHES A UNANIMOUS, BEYOND A REASONABLE DOUBT, VERDICT AS TO THE THREE OR MORE VIOLATIONS WHICH COMPRISE THE CONTINUING SERIES OF VIOLATIONS SHOULD BE REGARDED AS STRUCTURAL ERROR.

This case starkly presents the question raised by Justice Scalia in his separate opinion in *Neder v. United States*, 527 U.S. 1 (1999) – how many essential elements of the offense must be missing from the jury's verdict before it becomes impermissible for appellate courts, through application of harmless error analysis, to substitute their conclusions regarding the defendant's guilt for those which should have been made by the jury but were not? The absence of the unanimity instruction required by *Richardson v. United States*, 526 U.S. 813, 817 (1999), informing the jury that it must be unanimous as to the three or more violations which comprise the continuing series of violations permits the return of a less than unanimous verdict as

to as many as six elements of the offense: the three or more violations which are sufficiently related to comprise a continuing series of violations, and the other elements which can only be determined in relation to the specifically identified series of violations, *i.e.*, the five or more persons element, the role element, and the substantial income or resources element. To uphold a §848 conviction under such circumstances would do such substantial violence to the jury trial right guaranteed by the Sixth Amendment that the error in this case, and others like it, should be regarded as structural error.

In construing the elements of 21 U.S.C. §848 in *Richardson*, this Court recognized that "[c]alling a particular kind of fact an 'element' carries certain legal consequences." 526 U.S. at 817. One of those consequences "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the government has proved each element." *Id.* Thus, in the wake of *Richardson*, a jury may not convict a defendant of a §848 offense unless it agrees, unanimously and beyond a reasonable doubt that the defendant committed the *same* three or more violations. Under the instructions as given in this case, the jurors only had to ask themselves whether Ross had committed three or more related drug offenses, the operative word being "three". The jurors never had to ask themselves, as *Richardson* requires, "which three?" Absent unanimous agreement, a §848 conviction "in effect, imposes punishment on a defendant for the underlying crimes *without any factfinder having found that the defendant committed those crimes.*" *Richardson*, 526 U.S. at 822 (emphasis added).

The failure to charge the three-or-more-violations element of the §848 offense as defined by *Richardson*[3] and the

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Ross moved prior to trial to dismiss the §848 count for failure to specify the three or more predicate violations alleged to

concomitant failure to instruct the jury that it was required to agree unanimously on the *same* three or more *specific* violations was a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by harmless error standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Structural defects are those which "affect[] the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself." *Id.* at 310. Such errors "infect the entire process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), by "depriv[ing] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 9 (1999), *quoting Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

When the jury is not instructed that it must reach a unanimous verdict as to all elements of the offense, and those elements, *i.e.*, the violations alleged to comprise the continuing series of violations, were not even charged in the indictment, the error is very much akin to a defective reasonable doubt instruction, which a unanimous Court held to be structural error in *Sullivan v. Louisiana*, 508 U.S. 275 (1993):

> In *Fulminante*, we distinguished between . . . "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error standards,"... and trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented[.] . . . Denial of the right to a jury verdict of guilt beyond a reasonable doubt is

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constitute the continuing series of violations. That motion was denied by the district court.

> certainly an error of the former sort, the jury trial guarantee being a "basic protection[]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. . . . The right to trial by jury reflects . . . "a profound judgment about the way in which law should be enforced and justice administered.". . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Id. at 281-82 (citations omitted). *See also id.* at 284 (Rehnquist, C.J., concurring)(agreeing that "a constitutionally-deficient reasonable-doubt instruction is a breed apart from the many other instructional errors that we have held are amenable to harmless-error analysis"(emphasis omitted); *Carella v. California*, 491 U.S. 263, 268-69 (1989)(Scalia, J., concurring in the judgment).

In the federal system of criminal justice, the right of a criminal defendant not to be convicted except upon a unanimous verdict as to all elements of the offense has long been enshrined as fundamental, like the right not to be convicted except upon proof beyond a reasonable doubt. It is an essential component of the Sixth Amendment jury trial right. *See Richardson*, 526 U.S. at 817; *Johnson v. Louisiana*, 406 U.S. 356, 369-70 (1972)(Powell, J., concurring). Like a constitutionally defective reasonable doubt instruction, the lack of a proper unanimity instruction in a §848 case "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281. This is so because the three or more violations that comprise the series are the central core of the §848 offense – change the violations, and the series changes as well. The other elements of the offense – numerosity, role, and income – can only be found in relation to the specific series identified. *See Richardson*, 526 U.S. at 823. In the absence of a unanimous verdict on three or more specifically identified violations, the jury could not have found that *those violations* had the necessary

relatedness to be found to part of a continuing series of violations, *or* that *that particular series of violations* was committed by the defendant in concert with five or more persons with respect to whom he occupied an organizer, supervisor or management position, *or* that he obtained substantial income or resources from *that particular series of violations*. Because the other elements of §848 can only be found in relation to the particular violations found to constitute the series, it cannot be said, in the absence of the required unanimity instruction, that the jury reached a unanimous, beyond a reasonable doubt, verdict as to the violations which constituted the continuing series *or as to any other element of the offense*, except perhaps the initial triggering violation. Where such is the case,

> [a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

Sullivan, 508 U.S. at 281, *quoting Rose*, 478 U.S. at 578. *See also California v. Roy*, 519 U.S. 2, 7 (1996)(Scalia, J., concurring).

The courts of appeals which have considered the issue of whether the failure to give the unanimity instruction required by *Richardson* should be subject to review for harmless error have concluded that this Court's decision in *Neder* compels the conclusion that the absence of the unanimity instruction could be classified as trial, rather than structural, error.[4] *See Santana-*

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[4] It does not appear that this Court regarded the matter as a foregone conclusion. In *Richardson*, which was issued ten days before *Neder*, the Court remanded the case to the Court of Appeals, stating "[w]e leave to the Court of Appeals the question of *whether to*

Madera v. United States, 260 F.3d 133, 139-40 (2d Cir. 2001), *cert. denied*, 122 S.Ct. 817 (2002); *Lanier v. United States*, 220 F.3d 833, 838-39 (7th Cir.), *cert. denied*, 531 U.S. 930 (2000); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States v. Long*, 190 F.3d 471, 476 n.3 (6th Cir. 1999); *United States v. Escobar-DeJesus*, 187 F.3d 148, 161-62 (1st Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000). These cases completely fail to recognize the profound difference between the absence of a unanimity instruction and the omission of or misinstruction on a single element of the offense. When the jury was not instructed that it must be unanimous as to the same three or more violations comprising the continuing series of violations, there is, simply, *no* jury verdict which can be upheld through an appellate court's examination of the record to determine whether the jury's verdict would have been the same absent the error. Unanimity is not an element of the offense; it is an indispensable component of the federal jury trial right.

In *Neder*, unlike this case, the defendant was charged with all the elements of the offense; the error was that the judge, rather than the jury, decided the issue of materiality. The Court rejected the argument that the failure to submit an element of the offense to the jury should be regarded as structural error because "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U.S. at 9. The Court was also of the opinion that, under the circumstances presented in *Neder*, application of harmless error analysis did not do undue violence to the right to trial by jury guaranteed by the Sixth Amendment. *Id.* at 19. *But see id.* at 31-39 (Scalia, J., concurring in part and dissenting in part).The

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engage in harmless error analysis, and if so, whether the error was harmless in this case." 526 U.S. at 824 (emphasis added).

applicability of harmless error analysis to the failure to submit the materiality element to the jury was, the Court concluded, dictated by three prior decisions – *California v. Roy*, 519 U.S. 2 (1996);*Carella v. California*, 491 U.S. 263 (1989); *Pope v. Illinois*, 481 U.S. 497 (1987) – each of which involved only the omission or misdescription of a single element of the offense.

The question thus becomes whether there is a point somewhere along the continuum between an erroneous instruction regarding a single element of the offense and the direction of a verdict for the government on all elements of the offense where the level of violence done to the Sixth Amendment jury trial right becomes too great to permit the upholding of the defendant's conviction under the harmless error standard. As Justice Scalia has posed the question:

> . . . .The Court reaffirms the rule that it would be structural error . . . to "vitiat[e] *all* the jury's findings.". . . A court cannot, no matter how clear the defendant's culpability, direct a guilty verdict. . . . The question that this raises is why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking all of them away – since the failure to prove one, no less than failure to prove all, utterly prevents conviction.
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> The Court never asks, much less answers, this question. Indeed, we do not know, when the Court's opinion is done, *how many* elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty. . . . We know that all the elements cannot be taken from the jury, and that one can. How many is too many (or perhaps what proportion is too high) remains to be determined by future improvisation.

Neder, 527 U.S. at 32-33 (Scalia, J., concurring in part and dissenting in part).

Where the jury is not instructed that it must agree unanimously on the three or more violations which comprise the §848 continuing series of violations, the Sixth Amendment jury trial right guaranteed to criminal defendants in federal court is fundamentally undermined. In this case, for example, the jury was left free to roam at large among the uncharged transactions regarding which government witnesses testified and to convict Ross even if each juror had in mind three different violations which he found to be related and to satisfy the five or more persons and substantial income elements. A court could not uphold such a verdict under a harmless error standard without entirely substituting its review function for that which the Sixth Amendment assigns to the jury and *only* to the jury. Specifically, the Court would have to (1) find that the defendant committed three specifically-identified violations, (2) find that those violations constituted a continuing series of violations, (3) find that the defendant undertook those violations in concert with five or more persons (4) as to whom he occupied an organizer, supervisor, or management position, and (5) find that the defendant obtained substantial income or resources from those violations. In sum, the reviewing court would have to perform the jury's function as to *every* element of the offense.

The sheer magnitude of the judicial findings that the reviewing court would be required to substitute for the factfinding which the Sixth Amendment requires to be done unanimously by federal juries convincingly distinguishes *Richardson* error, at least where the defendant has not been charged with and convicted of three or more related violations of the controlled substances laws, from that in *Neder* and this Court's other single element instructional error cases. In cases such as this one, the reviewing court cannot simply examine the record for the evidence regarding a single omitted or

misinstructed element and determine whether the evidence as to that element was so overwhelming that the court can say beyond a reasonable doubt that the jury would have convicted the defendant had it been properly instructed. Instead, the court would effectively become the jury, a result utterly antithetical to the Sixth Amendment jury trial guarantee. Moreover, under circumstances such as those presented here, in which the defendant was not charged with three or more predicate violations, for a court to apply harmless error analysis would be for it to assume the mantle not just of the petit jury but of the grand jury as well. For such convictions to be upheld under a harmless error analysis would not simply be for the wrong entity to judge the defendant guilty but also for the wrong entity to formulate, after the fact, the offense of which the defendant was convicted.

II. IF A HARMLESS ERROR STANDARD IS APPLICABLE, THE CONSTITUTIONAL ERROR SHOULD BE EVALUATED ON COLLATERAL REVIEW UNDER THE *CHAPMAN* HARMLESS BEYOND A REASONABLE DOUBT STANDARD WHERE THE ERROR HAS NOT PREVIOUSLY BEEN AFFORDED *CHAPMAN* REVIEW.

The question of the harmless error standard which should be applied in determining whether relief should be granted under 28 U.S.C. §2255 based on error at trial of constitutional magnitude is one of substantial importance to the administration of criminal justice, and one which has divided the circuits. In this case, as it would be in many cases, the decision whether the *Brecht* or the *Chapman* standard controlled the harmless error analysis was very likely outcome-determinative.[5]

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[5] The fact that the Eleventh Circuit found it necessary to decide whether the *Neder/Chapman* standard or the *Brecht* standard

Ross contends that where, as here, a federal constitutional claim was asserted on direct appeal but summarily rejected based upon then-existing circuit precedent and, hence, was never afforded *Chapman* harmless error review, fairness demands that the *Chapman* review erroneously denied on direct appeal be afforded when, as here, that same claim is again asserted in a §2255 motion after an intervening decision of this Court invalidated the circuit precedent based on which the defendant's constitutional claim was rejected on direct appeal. Under such circumstances, the factors to which this Court pointed in *Brecht* as weighing in favor of the adoption of a less rigorous harmless error standard on collateral review of *state* convictions do not outweigh considerations of equity, fairness, or, most importantly, the paramount need to ensure the reliability and accuracy, within the federal system, of the jury's finding of guilt.

In *Brecht*, the Court began its analysis with the familiar notion that "collateral review is different from direct review," 507 U.S. at 633, but spoke of that difference in terms relevant primarily to collateral review of state convictions:

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. *The role of federal proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to*

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governed Ross' entitlement to relief under §2255 suggests that it regarded the issue as one with outcome-determinative significance. If the result would have been the same regardless of which standard was applied, then there would have been no need to resolve this important issue. *See Santana-Madera*, 260 F.3d at 140 (declining to resolve issue because *Richardson* error harmless under either standard).

relitigate state trials."

Id. at 633 (emphasis added), *quoting Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The most frequently cited reason for distinguishing between direct and collateral review, the Court said, is "the state's interest in the finality of convictions *that have survived direct review in the state court system.*" 507 U.S. at 635 (emphasis added). Other important reasons rest in principles of comity and federalism, the Court continued:

> The states possess primary authority for defining and enforcing criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. *Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.*

Id. (emphasis added), *quoting Engle v. Isaac*, 456 U.S. 107, 128 (1982). Finally, the Court said, "we have recognized that '[l]iberal allowance of the writ . . . degrades the prominence of the trial itself,' . . . and at the same time encourages habeas petitioners to relitigate their claims on collateral review." 507 U.S. at 635, *quoting Engle*, 456 U.S. at 127.

Because the state courts had already reviewed the error under *Chapman* and because "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and . . . often occupy a superior vantage point from which to evaluate the effect of trial error," 507 U.S. at 636, the *Brecht* Court was of the view that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless error review that *Chapman* requires state courts to engage in on direct review." *Id.* Furthermore, the Court stated, "[o]verturning final and presumptively correct convictions on collateral review because

the state cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Id.* at 637. Based upon these considerations, the Court concluded, "the imbalance of costs and benefits of applying the *Chapman* harmless error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Id.*

Brecht, then, was a case in which the habeas petitioner had already been afforded *Chapman* review of his constitutional claim by the highest court of the state, a context in which concerns of comity and federalism are at their strongest. The question presented here is whether the factors which led the Court to announce a less stringent harmless error standard applicable to collateral review of constitutional errors in *state* criminal proceedings counsel adoption of the *Brecht* standard for collateral review of constitutional error in *federal* criminal proceedings, particularly where, as here, the constitutional claim was rejected on the merits on appeal – erroneously, as we now know – and, hence, the error was never evaluated under the *Chapman* standard.

Most of the circuits have considered the question whether *Brecht* should be applied on collateral review of state convictions even where the constitutional error was not evaluated under *Chapman* on direct review. In *Orndorff v. Lockart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 511 U.S. 1060 (1994), the Eighth Circuit held that, where the state courts had not afforded the habeas petitioner review of the harmfulness of the constitutional error that occurred at his trial under *Chapman*, the federal courts should apply the *Chapman* harmless beyond a reasonable doubt standard on collateral review once they have determined, contrary to the conclusion of the state court, that federal constitutional error did in fact occur, reasoning that "the *Brecht* rule is based largely on the notion that because the state courts can properly apply the *Chapman* harmless error

standard on direct review, the federal courts need only review those decisions under the *Kotteakos* harmless error standard." *Id.* at 1430. Where, however, the state court had not found constitutional error and, therefore, had not subjected that error to scrutiny under the more exacting *Chapman* standard, federal courts on collateral review should apply the *Chapman* standard. 998 F.2d at 1430.

Agreeing with *Orndorff*, Judge Wood of the Southern District of New York reasoned:

> This court finds the Eighth Circuit position – that *Brecht* does not extend to cases like this one – more persuasive. Not only did *Brecht* twice note that four courts had previously applied *Chapman* to the petition at issue there, but it also emphasized that
>
> > [s]tate courts are fully qualified to identify constitutional error *and evaluate its prejudicial effect* on the trial process under *Chapman*, and state courts often occupy a superior vantage point *from which to evaluate the effect of trial error*. . . . For these reasons, it scarcely seems logical to require federal habeas courts to engage in *the identical approach* to the harmless-error review that *Chapman* requires state courts to engage in on direct review.
>
> 507 U.S. at 636 . . . (citations omitted)(emphasis added). That is, rather than simply invoking comity and federalism alone, *Brecht* explicitly noted state courts' ability *separately* (1) to identify constitutional error, and (2) to evaluate the effect of that error under *Chapman*. . . . *Brecht*'s result, then, was premised largely on respect for the actual, conscientious review of harmlessness performed by the four prior courts – both federal and state – that applied *Chapman*.

Lyons v. Johnson, 912 F.Supp. 679, 688-89 (S.D.N.Y.), *aff'd on other grounds*, 99 F.3d 499 (2d Cir. 1996). In a case arising under §2255, Judge Ward of the Southern District of New York agreed with *Lyons*

> that *Brecht* was premised largely on respect for the actual, conscientious review of harmlessness performed by another court, state or federal. . . . Absent such a review to determine whether an error contributed to conviction "beyond a reasonable doubt," there are compelling reasons for the habeas court to apply *Chapman*. Since the *Chapman* standard applies on direct review in order to ensure accurate determinations of guilt or innocence, it is essential that a prisoner not lose the benefit of that analysis merely because his or her claim is brought in a collateral proceeding. As long as a court – either on direct or collateral review – is the first to conduct a harmless error analysis, it should be required to conduct a *Chapman* analysis in order to "restore our faith in the verdict's accuracy to a reasonable certainty."

Monsanto v. United States, 143 F.Supp.2d 273, 286 (S.D.N.Y. 2001), *quoting Brecht*, 507 U.S. at 654 (O'Connor, J., dissenting).

The majority of circuits have, however, extended *Brecht* to encompass collateral review of state convictions in which no *Chapman* review was conducted in the state court. *See Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000); *Gilliam v. Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999), *cert. denied*, 528 U.S. 1120 (2000); *Hassine v. Zimmerman*, 160 F.3d 941, 950-52 (3d Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999); *Hogue v. Johnson*, 131 F.3d 466, 498-99

(5th Cir. 1997), *cert. denied*, 523 U.S. 1014 (1998);[6] *Sherman v. Smith*, 89 F.3d 1143, 1140-41 (4th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997); *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995), *cert. denied*, 516 U.S. 1123 (1996); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir.), *cert. denied*, 516 U.S. 960 (1995).[7]

These decisions as a whole rest on the dual premises that (1) this Court, despite its repeated references to the fact that the petitioner had been afforded *Chapman* review by the state appellate court, did not in fact accord particular significance to that fact, and (2) the concerns which this Court found to weigh in favor of the application of a more forgiving harmless error standard on collateral review of state convictions – comity, federalism, and finality – are implicated whenever a federal court collaterally reviews a state criminal proceeding, regardless of whether the state court had or had not found constitutional error

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Another panel of the Fifth Circuit, in *Barber v. Johnson*, 145 F.3d 234 (5th Cir.), *cert. denied*, 525 U.S. 1005 (1998), regarded *Hogue* as potentially "inconsistent with the Supreme Court's underlying reasoning for applying the *Brecht* standard in federal habeas review," *id.* at 236-37, but felt itself bound to follow *Hogue*. *See also id.* at 237-38 (Dennis, J., concurring specially).

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The Eleventh Circuit cited *Horsley* in support of its rejection of Ross' argument that the *Chapman* standard should be applied under the circumstances of this case. The discussion of the applicable harmless error standard in *Horsley* was, however, limited to a two sentence footnote which gave no reasons for the Court's selection of the *Brecht* standard beyond citing to the rationale underlying *Brecht* – "advancing comity, federalism, finality, and the importance of the trial," *id.* – a rationale of limited applicability to collateral review of *federal* convictions.

and evaluated its harmfulness under the *Chapman* standard. The former premise is convincingly rebutted by the analysis of *Orndorff*, *Lyons*, and *Monsanto*. *Lyons* also contains a convincing rebuttal of the latter premise as well:

> [T]he comity concerns that the *Brecht* plurality opinion raises . . . are far more strongly implicated if federal courts choose to repeat *Chapman* analyses even when state courts have already conducted them, than if federal courts choose to perform *Chapman* analyses that state courts have not performed. The former choice, not the latter, can be construed to convey federal courts' lack of respect for state courts' ability as federal constitutional interpreters, and hence to violate obligations of comity and principles of federalism. Put another way, federal courts should, under *Brecht*, respectfully defer to state courts' analyses of the harmlessness of constitutional error – but where no prior state court *Chapman* holding exists, there is nothing to which to defer.

912 F.Supp. at 689.

When the field of inquiry moves from federal collateral review of state convictions to federal collateral review of *federal* convictions, the comity and federalism considerations which underlay the decision in *Brecht* are nonexistent. The question then becomes whether the remaining concerns which underlay *Brecht* – finality and the importance of the trial process – are, by themselves, sufficient to warrant the application of a less stringent harmless error standard on review of federal convictions under §2255, at least where there has been no prior *Chapman* review. They are not.

Where error of constitutional magnitude occurred during a *federal* criminal trial, there are no finality interests comparable

to those present when a state has tried and convicted a criminal defendant and afforded him full appellate review of his constitutional claims. Moreover, against any generalized interest in finality must be weighed the fact that, in this case, it was the error of a *federal* appellate court which denied the §2255 movant full and fair review of his constitutional claim on direct review. In such cases at least, remedying the error in the §2255 proceeding by providing the review to which Ross was constitutionally entitled on direct appeal should take precedence over abstract notions of finality.

In addition, because the error here went to the very heart of the trial process itself, the importance-of-the-trial rationale of *Brecht* also provides little or no justification for the application of the *Brecht* standard in this context. The very point of *Richardson* is that the requirement that the jury agree unanimously upon the *same* three or more violations is essential to ensure that the jury actually does focus upon just what violations the defendant did or did not commit. Where the jury was not told, as required by *Richardson*, that the violations comprising the continuing series are three *separate* elements of the offense, each of which it must find unanimously and beyond a reasonable doubt, the trial process is not such a reliable determination of guilt as to warrant the additional protection of the *Brecht* standard. Here, there is no principled distinction between Ross' fully preserved and litigated *Richardson* claim and those of defendants who were fortunate enough to be on direct review when *Richardson* was decided.

The circuits which have addressed the issue whether the *Brecht* or the *Chapman* harmless error standard should be applied in proceedings under §2255 have, by and large, simply not stopped to consider the manifest differences between the context in which *Brecht* arose and the §2255 context, or the extent to which the factors on which the Court predicated its decision in *Brecht* are either not relevant or may carry less

weight in the balance in the context of collateral review of federal convictions. For example, the Fifth Circuit in *United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999), and the Eleventh Circuit in *Vines v. United States*, 28 F.3d 1123, 1130 (11th Cir. 1994), simply assumed, without discussion, that the *Brecht* standard applied to all cases on collateral review, regardless of whether that review was of a state or a federal conviction. The First Circuit in *Singleton v. United States*, 26 F.3d 233, 236-37 & n.9 (1st Cir.), *cert. denied*, 513 U.S. 1003 (1994), did little more, indicating in one sentence in a footnote that "we think the *Brecht* rationale – *fundamentally* anchored in traditional concerns for finality – operates with like vigor in the federal habeas context . . . ." *Id.* at 237 n.9 (emphasis in original). *Singleton* failed to recognize the very great extent to which the finality concerns addressed by this Court in *Brecht* were intertwined with the powerful twin concerns of comity and federalism which are present when a federal court collaterally reviews a state conviction. Where comity and federalism concerns are not present, as they are not in the §2255 context, the finality interest is simply that – the interest in having a case over and done with, a legitimate interest, to be sure, but one without the added weight which comity and federalism concerns lend it, and one made less weighty by countervailing considerations not present on collateral review of state convictions.

Where federal courts are conducting collateral review of *federal* convictions, there is an institutional interest in ensuring the constitutional legitimacy of criminal proceedings in the federal criminal system, a goal which can only be reached by evaluating constitutional error under the *Chapman* standard at *some* point in the process; if *Chapman* review is not conducted on direct appeal, then that point must necessarily come where constitutional error is first identified in §2255 proceedings. Under such circumstances, the need to assure the accuracy of the verdict provides a substantial counterbalance to considerations of finality. Moreover, the constitutional issues which federal

courts consider on the merits on collateral review of state convictions would, because of the exhaustion requirement, universally have been presented to, and ruled on by, the state courts in the first instance. By contrast, on §2255 review of federal convictions, the constitutional issues would, because of the prohibition against relitigating in a §2255 motion issues which have already been decided adversely on direct appeal, most likely *not* have been previously ruled on, unless, for example, as here, a subsequent decision of this Court invalidated the pre-existing precedent based on which the movant's constitutional claim was rejected on direct appeal, making the §2255 court the *first* court with the opportunity to consider the impact which the error may have had on the verdict. The interest of the states in the finality of convictions which have been upheld on appeal by state appellate courts which have given full and fair consideration to the petitioners' constitutionally-based challenges to their convictions is considerably stronger than the interests of the federal courts in the finality of federal convictions marred by constitutional error being evaluated for the first time on collateral review. This is especially true where, as here, the §2255 movant had previously sought relief to no avail at trial and on appeal. "[F]ederal trials only achieve a sense of finality and sanctity when a prisoner's allegedly erroneous conviction is adequately reviewed to ensure fairness and accuracy." *Monsanto*, 143 F.Supp2d at 285.

In the context of *Richardson* error specifically, the Sixth Circuit in *Murr,* 200 F.3d at 906, applied the *Brecht* standard on collateral review, apparently on the assumption that, because the *Richardson* issue arose on collateral review, *Brecht* automatically applied. The Seventh Circuit applied the *Neder/Chapman* standard on collateral review of a *Richardson* error in *Lanier*, 220 F.3d at 839, but did not explain the rationale

underlying its application of that standard.[8] The Second Circuit recognized the issue in *Santana-Madera*, 260 F.3d at 140, but found it unnecessary to resolve it in that case.

Only one court has given the question whether *Brecht* or *Chapman* provides the appropriate harmless error standard on §2255 review of a federal criminal conviction where the constitutional error has not previously been evaluated under the *Chapman* harmless beyond a reasonable doubt standard the careful and thoughtful scrutiny which it deserves. *Monsanto*, 143 F.Supp.2d at 280-86, also a case involving *Richardson* error, held that *Neder/Chapman* was the appropriate standard where constitutional error in a federal case had never been reviewed under *Chapman*:

> Having considered the various arguments set forth by the parties and the circuit courts that have addressed this issue, this Court finds that the rationales identified in *Brecht* for applying a less onerous harmless error standard on collateral review do not justify the application of that standard in a §2255 proceeding where there had been no *Chapman* analysis on direct review. . . . [T]he Court can quickly disregard federalism and comity concerns as they have no application to a review of a federal conviction. This

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[8] The very different procedural postures in which the issue reached the appellate courts may go far to explain why each Court appears to have almost taken it for granted that the standard it applied was the correct one – in *Murr*, the defendant did not raise a *Richardson*-type issue on direct appeal, *see United States v. Phibbs*, 999 F.2d 1053, 1086-87 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994), while in *Lanier*, as in this case, the defendant *did* raise the issue at trial and on direct appeal. *See United States v. Kramer*, 955 F.2d 479, 486-87 (7th Cir.), *cert. denied*, 506 U.S. 998 (1992).

leaves the Court with concerns for finality and sanctity of the trial process, which, the Court finds, are insufficient reasons to apply *Brecht* in this case.

Applying the less burdensome harmless error standard on collateral review of a federal conviction where the habeas court is the first to review the error for harmlessness fails to take into account the fundamental purpose served by applying the strict *Chapman* standard. Justice O'Connor, dissenting in *Brecht*, stated:

> If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim. Whatever the source of the *Chapman* standard, the equities may favor its application on habeas if it substantially promotes the central goal of the criminal justice system – accurate determinations of guilt and innocence.

Monsanto, 143 F.Supp.2d at 285, *quoting Brecht*, 507 U.S. at 652 (O'Connor, J., dissenting).

This Court recognized in *Richardson* the special risks of unfairness present when the jury is, as here, permitted to consider the §848 predicate violations as alternative means rather than as separate and distinct elements of the offense:

> The CCE statute's breadth also argues against treating each individual violation as a means, for that breadth aggravates the dangers of unfairness that doing so would risk. . . . At the same time, the government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in

> numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do. The second consideration considerably aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus on specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

526 U.S. at 819 (emphasis added). If *Richardson* errors such as that which occurred in this case are to be subject to review for harmless error, this manifest potential for unfairness and inaccuracy demands that the error be afforded *Chapman* harmless beyond a reasonable doubt review to ensure the accuracy and integrity of federal criminal convictions.

The question then becomes how a court is to make the *Neder/Chapman* harmless error assessment. The fundamental flaw in the harmless error analysis conducted by the Court of Appeals is that it looked only to whether there was sufficient evidence generally to permit the jury to find that Ross committed *a* third predicate violation in addition to the two conspiracies of which he was convicted.[9] The very point of *Richardson*,

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[9] Both the district court and the Court of Appeals found the error harmless in this case on the assumption that surely had the jury been properly instructed, it would have unanimously found *a* third violation, without ever identifying a violation that the jury would necessarily have found beyond a reasonable doubt. The Court's reference to a "third" violation stems from its assumption – erroneous,

however, is that it is *not* enough that the jury concluded that the defendant committed a series of violations – *Richardson* requires jury unanimity as to at least three *particular, specifically identified violations. Every* juror must agree, beyond a reasonable doubt, that the defendant committed the *same* three predicate violations, and that those violations were related to each other and that the series so defined satisfied the numerosity, role, and income elements of §848.

That being the case, harmless error analysis must look, not to the evidence as a whole, but instead to the evidence as to

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Ross would contend – that the completely coterminous conspiracies charged in Counts II and III would qualify as two of the three series components.

In many, if not most, of the cases which have subjected *Richardson* error to harmless error analysis, the defendant had also been convicted of a number of substantive offenses in addition to the §848 offense, which the courts pointed to as confirmation that the jury had in fact agreed unanimously on the same three or more offenses. *See, e.g., Santana-Madera,* 260 F.3d at 140-41; *United States v. Stitt*, 250 F.3d 878, 883-84 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 1953 (2002); *United States v. Smith*, 223 F.3d 554, 568 (7th Cir. 2000); *United States v. Jefferson*, 215 F.3d 820, 823 (8th Cir.), *cert. denied*, 531U.S. 911 (2000); *Murr*, 200 F.3d at 906; *Escobar-DeJesus*, 187 F.3d at 62. In other cases, the courts pointed to specifically-identified violations as to which the jury could not have failed to be unanimous. *See, e.g., Lanier*, 220 F.3d at 839; *Romero v. United States*, 2002WL553563 (S.D.N.Y. April 12, 2002); *United States v. Benevento*, 81 F.Supp.2d 490, 493-94 (S.D.N.Y. 2000); *see also Monsanto*, 143 F.Supp.2d at 287-92. So far as Ross' research has revealed, the only cases which have upheld §848 convictions in the face of *Richardson* error without specifically identifying violations that the jury would necessarily have found beyond a reasonable doubt have been reviewed under a plain error standard. *See, e.g., United States v. Richardson*, 233 F.3d 223, 229-30 (4th Cir. 2000), *cert. denied*, 122 S.Ct. 1806 (2002).

each potential predicate violation. If the violations are analogized to omitted elements, then *Neder* dictates that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." 527 U.S. at 18. If, however, the defendant contested the missing element, the court must determine whether the "record contains evidence that could rationally lead to a contrary finding with respect to that omitted element. *Id.* at 19.

> [I]f the element was genuinely contested, and there is evidence upon which a jury could have reached a contrary finding, the error is not harmless. It is not harmless because, in that circumstance, we cannot determine beyond a reasonable doubt that the "jury verdict would have been the same absent the error."

United States v. Brown, 202 F.3d 691, 701 (4th Cir. 2000), *quoting Neder*, 527 U.S. at 19. As applied to the absence of a *Richardson* unanimity instruction, if there is evidence based on which the jury could have disagreed about whether the defendant committed a particular violation, or whether that violation formed a "continuing series with other violations, then the error cannot be held harmless. Only if there is a specific related violation which a rational jury could not have failed to find unanimously beyond a reasonable doubt could the error be said, under the *Neder* analysis, to be harmless beyond a reasonable doubt.

The appropriate question is not, therefore, whether there was evidence from which the jury could have unanimously concluded that the defendant committed three or more violations. Harmless error analysis which fails to look at the evidence as to each potential predicate violation is inconsistent with the

concern that this Court expressed in *Richardson* that "treating violations simply as alternate means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover-up wide disagreement among the jurors about just what the defendant did or did not do." 526 U.S. at 819. Upholding a CCE conviction on the theory that the government's witnesses testified to so many transactions that the jury surely would have unanimously found at least one substantive violation is flatly inconsistent with the reasoning underlying *Richardson*. *Richardson* error may be held harmless only if there is a specifically-identified violation as to which there was no evidence which could rationally have led to the jury's inability to find unanimously, beyond a reasonable doubt, that the defendant committed *that specific violation*.[10]

At the trial of this case, Ross contested *every* transaction and provided the jury with ample reason to disbelieve the testimony of *each* of the government's witnesses. He also strenuously contested other evidence which the government contended linked him with certain drug transactions. The record in this case contained evidence that could rationally have led the jury to disagree regarding whether Ross committed each of the

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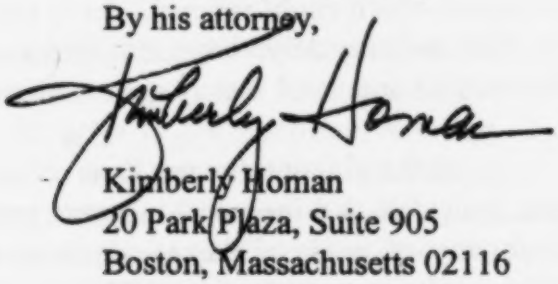
[10] This case also presents the subsidiary issue of where a court may look for the predicate violations to which it will apply its harmless error analysis. *Richardson* held that the three or more violations comprising the continuing series are elements of the offense, and, that being the case, it is axiomatic that they must be charged in the indictment. Ross' CCE conviction cannot, therefore, be upheld without convicting him of an offense with which he was not charged. There being no controlled substances offenses charged in the indictment other than the two conspiracy offenses, *but see* note 9, *supra*, there are no additional predicate violations to which harmless error analysis may permissibly be applied. *See Monsanto,* 143 F.Supp.2d at 287 n.10.

transactions as to which the government's highly impeached witnesses testified. The failure to give the required unanimity instruction was not harmless beyond a reasonable doubt.[11]

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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[11] Even were the *Brecht* standard to be applied, the error here had a substantial and injurious effect on the verdict, especially in light of the indictment's failure to charge the three or more violations alleged to constitute the series.